VIRGINIA LAW REGISTER

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Where Judge-Made Law Was Law Well Made.

We often hear—and often with much justice—"Judge-made law" condemned as unwise, improper and an infringement on the law-making power by the judiciary. But few people who make sneering remarks on this subject are able to differentiate between what they call "judge-made law" and "law construed by the judges." The latter is absolutely essential to the administration of justice and many a valuable act would not be worth the paper it was written upon but for the way in which it is construed. No finer exemplification of the value of a learned judge's construction of a law can be found than that which Lord Alverstone, Chief Justice of England, gave to the law-creating the Court of Criminal Appeal. He had a most difficult piece of work before him. A principle new to English criminal jurisprudence, and not actively welcomed by the average judge, had been embodied in a very short and far from lucid statute. The language of the Act was vague and confused, because the minds of those who drafted it were tentative and hesitating as to the lines on which they should shape their reform. Public opinion and enlightened jurisprudence required that, both in fact and in law, some right of appeal should be given to a person convicted on indictment: but the limits and safeguards of the right no one felt sure about. To a certain extent the verdicts of juries must be respected even by a tribunal which doubts their correctness: to leave no discretion to the twelve jurymen who see the witnesses would turn trial by a jury into a farce. To some extent the trial judge must be left with unfettered discretion as to the sentence he passes; to substitute a different sentence every time the Court of Criminal Appeal disagrees with his views would be impossible and mischievous. Again, to quash a conviction

for every little error as to fact or law which a judge may make on summing-up would turn a trial from a serious attempt to get justice done into a mere piece of intellectual gymnastics. But the way to overcome those difficulties the wording of the statute made far from clear. On one interpretation of its intention the Court might have refused to pay any regard to the opinion of judge and jury below: it might have read the shorthand report and decided every case *de novo* on its own opinion of the evidence thus obtained. On another interpretation it might have refused to interfere with verdicts for any reason except the narrow grounds of some technical defect. Lord Alverstone steered the golden mean between these extremes, and the impulse he gave the Court commanded general approval. To him is due the three leading views which now govern the policy of that Court. The decision of a jury will not be interfered with merely because the judges above disagree with the verdict, provided that it was a verdict reasonably found on evidence properly admitted. The discretion of a judge in passing sentence will not be interfered with, unless he has gone wrong in principle; but within their limits the Court will standardize sentences. And mere technical slips in the direction of a judge will not be allowed to quash a verdict, unless they might have led a jury astray. In successfully laying down those great leading principles, and in inducing his colleagues to habitually accept and act upon them, Lord Alverstone rendered a really great service to the cause of Criminal Appeal in England—a system which has now passed the stage of experiment, and the permanent adherence to which might have been endangered by any blunder in the initial administration of the Act.

To the Virginia lawyer two of these leading views are very familiar and in fact well-established principles in our practice. And the third is being gradually but surely laid down by our present Supreme Court as the correct rule in all criminal appeals, i. e., that no mere technical slip will be allowed to quash a verdict unless the slip caused an apparent injustice or misled the jury. We believe Lord Alverstone must have made a careful examination of Virginia authorities as he shaped out the course of the English Criminal Appeal Court. But jesting

aside, whether he did or not it is pleasing to have this great lawyer's opinion coinciding with that of the great lawyers on our own bench.

A Great Judge.

Lord Alverston, the Lord Chief Justice mentioned in the foregoing editorial, has retired from the Bench, being succeeded by Sir Rufus Isaacs, the first member of the Jewish race to become Lord Chief Justice of England. That Lord Alverstone was a great judge seems beyond all peradventure of a doubt, and the *London Law Journal* commenting on one of his decisions, pays him the following high tribute, which we cannot forbear from copying, not only on account of the tribute to the distinguished jurist, but as setting an example which all nisi prius judges might well follow:

> "It is, of course, as a *nisi prius* judge that a Lord Chief Justice comes most prominently before the public; and his methods or preferences tend to mould to no inconsiderable degree the style of forensic procedure as well as the habits of official administration. Here Lord Alverstone's example has been all for good. He has set his face against the bad habit of browbeating a case out of court which some judges in former days too often adopted; he has always allowed a plaintiff or defendant, however poor his case, to state it in open court and to call all his available witnesses. Again, he has not been finical in the admission or rejection of evidence; he has understood that in practical life some questions properly put must appear leading questions; he has not worried counsel about the form of the queries, or taken captious exception to modes of cross-examination. But waste of time or irrelevance he has severely discountenanced, and practices which plain men think unfair he has never hesitated to condemn. An example from his charge to a Grand Jury at Hertford, in June, 1912, will explain what we mean. 'We have noticed lately,' he said, 'that there is a disposition on the part of the police sometimes to question a prisoner unduly. Now, it must be understood that, although it is quite right to ask questions of a man before he is charged, or at times even after he is charged, neither before nor after ought questions to be put in the nature of cross-examination. Therefore, the police authorities must understand, especially superintendents,

that the cross-examination of a prisoner or person charged, or likely to be charged, can only be properly done when he is giving evidence, and it is not in accordance with law or right that a man should be cross-examined at any other time.' Here we have the same vigorous rebuke of un-English methods which is to be found in many classical passages of Coke, Camden, and Mansfield."

Law and the Church.

The foundation of our Government is religious liberty. The Courts have no more to do with questions of religion than they have with problems of astronomy. Before the tribunals of justice in this country, Protestant and Catholic, Parsee and Mohammedan: the disciple of Confucius or the follower of Buddha stand absolutely equal. It is true that there are certain sections of this country in which this important fact seems to be forgotten, and either through ignorance of fundamental laws or absolute disregard of the basic principles upon which this Republic is founded, there are those in high office who ignore the danger of allowing law to recognize one church as against another. This wilful disregard of law seems to be growing. We have no patience with those who would stir up strife between the different denominations in this country. But we stand aghast at the way in which certain judges in this country set themselves up as guardians of this or that church and decide cases before them—not upon principles of law and morality but upon the so-called church proclivities of suitors in the courts or wards under their custody. We had occasion some time ago to comment upon the monstrous conduct of a judge who removed a guardian because she had infant children of Catholic parents baptized by a Methodist minister. And this done on the motion of a Catholic priest. And now we find another judge in that same State allowing the adoption of an infant, born a Catholic, by Protestant people because from the evidence he believed the child was a Protestant. Of course we find the Catholic priest, as priest, appearing and objecting to the adoption because the child had been baptized in the Catholic faith.

The sapient surrogate in this case said: "I will not allow a Protestant to adopt a Catholic child, nor will I allow a Catholic to adopt a Protestant child, nor a Gentile a Jewish child or *vice versa,* but I hold, according to the evidence, that Margaret Mollinaro is a Protestant. The girl says she wants to be a Protestant and grow up one. There is no testimony here that she ever made her first communion in the Catholic Church nor has she been confirmed in that faith."

We would like to know what business the surrogate had with the religious beliefs of any person who stood at his bar? Or what he had to do with the baptism or nonbaptism of any infant under his charge as judge? If the people desiring to adopt the child were of good moral standing, and fit to have the child in all other respects, what had he to do with their religious beliefs? Suppose Margaret Mollinaro had been confirmed in the Catholic Faith. What is the Judge supposed to know about that? Suppose she had been sprinkled by a Presbyterian or immersed by a Baptist. Will the Court decide as a matter of law that a Baptist is unfit to rear a Presbyterian or *vice versa?* Has the Court a right even to listen one moment to anything on a religious subject and draw invidious distinctions between one religious tenet or another? We have heretofore taken little stock in the idea that there is any danger of one branch of the church gaining ascendency in this country. But it does look to us that the danger is not to be disregarded when we see the very fountain of justice muddied at its source by allowing the interference of any man—be he Priest or Pagan —with the administration of justice on the ground that the religion of any man or woman should stand as a bar to the absolute impartiality of the ministers of justice. Thinking men—lovers of religious freedom, of pure undefiled justice—should be on their guard.

A "Comeback."

It is not often that the despised corporation has a chance to "come back" at the claimant for damages, but the Erie Road has set an example which may be the precursor of numerous pleas of "set-off." A man named Wilkinson, driving a milk wagon

in Bloomfield, N. J., last Spring, attempted to cross the railway track on one of the streets of that town. A locomotive prevented his completing the trip by smashing him up in a decidedly unpleasant fashion. His kidney was ruptured, his ribs broken, his hip fractured and he "allowed" he was damaged to the tune of $25,000 and sued accordingly.

To his surprise, the Erie came back with an "answer and counterclaim" which put the boot on the other foot. Driving recklessly, it is stated in that part of the answer in which the counterclaim is set out, the plaintiff, (Wilkinson), drove upon the crossing as a train was approaching, and bumped into the locomotive, thereby bending and breaking "divers slats of the cowcatcher," and with the further result that the "paint and polish of said locomotive" was "bruised, abraised, mutilated, and destroyed," and the right of way "strewn with litter and pieces of wood."

The counterclaim further sets out that by reason of the plaintiff's having "approached the said crossing at a rapid, reckless, and dangerous rate of speed," and the resultant collision, the Erie was "obliged to lay out and expend large sums of money in * * * repairing the said locomotive, track, and roadbed, as aforesaid, and in removing the litter and pieces of wood so strewn along and upon its track and roadbed through the negligence and carelessness of the plaintiff."

The "answer and counterclaim" further avers that the "defendant, through and by the negligence of the plaintiff, as aforesaid, at a great financial loss to the said defendant, was obliged to stop and restart its said locomotive and train at the said crossing," etc.

The answer denies all liability for damages, while in the counterclaim the Erie demands $100 damages from the plaintiff.

The case has not yet come up for trial and we will await the result with much interest. At first glance the "set-off" looks like a joke and yet, is it? We can well imagine a case where a wealthy and reckless automobile owner would attempt to speed across a railway track in sight of a moving train which strikes him and in consequence is derailed and the fireman and engineer killed. Would not their personal representatives or next of kin have as good a claim for damages against the automobile owner

as his would have against the railway, in case he had been struck and killed by the negligence of its servants? At the same time this "counterclaim" or "set-off," as we would call it, reminds us of the story of the engineer whose locomotive had run over and killed a poor tramp. He was weeping bitterly and when some one tried to console him with remarks on the uncertainty of life and the general worthlessness of the dead man he replied, "Oh, d—— the tramp! I'm not bothering about him! But just look how he has mussed up my engine!"

Freak Legislation Once More.

Speaking of "Freak Legislation"—of course bearing in mind that anti-liquor laws are never freakish in anyway—we see the United Circuit Court of Appeals has pronounced the Iowa Statute providing for the sterilization of habitual criminals unconstitutional, null and void. The decision, which affects similar laws in other States, grants the writ of temporary injunction sought by Rudolph Davis, an inmate of the State Penitentiary, enjoining the members of the Board of Parole, the Warden, and the penitentiary physician from subjecting the prisoner to the operation.

Judge Walter I. Smith, United States Circuit Judge for this (the Eighth) district, and Judge John C. Pollock, United States District Judge for the District of Kansas, concurred with Judge McPherson. In his opinion Judge McPherson says:

"Complainant in his verified bill alleges that the statute is in violation of the United States Constitution in that it is in effect a bill of attainder, in that there is to be no indictment or trial; that the statute abridges his privileges, and that he is denied the equal protection of the laws; that he is denied due process of law; that the statute is in conflict with the Iowa Constitution in that the statute denies the inalienable right to enjoy life, liberty, and to pursue and obtain safety and happiness; that there is no jury trial awarded him and that the statute provides cruel and unusual punishment."

After discussing the case at length, Judge McPherson says:

"Our conclusion is that the infliction of this penalty is in vio-

lation of the Constitution, which provides that cruel and unusual punishment shall not be inflicted."

Further, Judge McPherson holds that the statute deprives the convict of due process of law. Moreover, he holds that the statute fulfills the definition of a bill of attainder, a legislative act which inflicts punishment without a jury trial.

Just exactly in what respect this law is a "bill of attainder" is a problem too hard to attempt to solve in hot weather. Possibly the barring of the hope of an inheritable issue may be so classed by a Judge who doesn't know any better. We would like to see this whole question discussed by the judges in Iowa who upheld the Eugenic Marriage Law in that State, and Judges McPherson, Smith and Pollock who sat in the present case. Eugenics *versus* Eunuchs would be euphonic, anyway, if the case when discussed was reported.

The Virginia State Bar Association Bars the White Sulphur on Account of the Lack of a Bar.

Our Association was scheduled to meet at the "Old" Greenbrier White Sulphur the first week in August. The place of meeting has been changed and it has been suggested that the rigours of the law now in force in our "daughter State" (alas! how she has departed from her early raising) is the reason. Not only is the fragrant mint forbidden save with roasted lamb—but wine cannot be served at the banquet. A private bottle is useless, for you cannot give a friend—or enemy—a drink of spirituous liquors without being subjected to pains and penalties. The high-ball has become a low-ball; the gin-sling has been slung across the border; beer is laid upon its bier, and "straight" whisky can only be obtained "crookedly." No wonder the "White" is blue, and that the Bar of our own State will take its Scotch hot, or at the Hot anyway. "Because West Virginia is virtuous there will be no more cakes and ale," anyway for Virginia lawyers in her borders. And the Association does wisely. If men are to be treated as schoolboys, they can at least stay away from school.

August.

It being August must be the only apology the Editor-in-Chief can offer for the above editorial and when it reaches our readers he will be somewhere off the coast of Ireland on a sharp lookout for Ulsterites and stray shots—not to speak of suffragettes militant—and hence out of danger from his seriously inclined brethren. And it being too hot to ponder over deep legal questions he wants to enquire why any one should worry over law, or courts or anything else in August. There are actually one or two judges who hold terms of court in August. Broiling alive would be too mild a punishment for them, especially in view of the fact that heat would not be any punishment to them. Old England sets us a wiser example. August is the vacation month. The Inns of Court are deserts in this month and though a few solicitors are now and then seen wandering through the city, the barristers are all away, hunting or fishing or shooting or traveling. They are wiser folk than we are.

In one of the cities of West Virginia they have for some years adopted a rule which works well. Every lawyer but one leaves town in August. They take it in turn as to who is to be that one, so no one is inconvenienced. They say that one lawyer does the work of the whole bar for that month and finds a vast deal of spare time on his hands. Isn't the West Virginia plan worthy of adoption elsewhere?